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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,

Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION and LYNN A. MATHESON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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FOUR COUNTIES WATER USERS ASSOCIATION and LYNN A. MATHESON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Colorado River Water Conservation District and Middle Park Water Conservancy District pray that a writ of certiorari issue to review two judgments of the Supreme Court of Colorado entered January 23, 1967.

CITATIONS TO OPINIONS BELOW

The opinions of the Colorado Supreme Court are not yet reported in the official Colorado reports but are reported as *Four Counties Water Users Association v. Colorado River Conservation District*, 425 P.2d 259 and *Four Counties Water Users Association v. Middle Park Water Conservancy District*, 425 P.2d 262. Copies of these opinions and the judgments thereon are reprinted herein as Appendices A and B, respectively.

JURISDICTION

The judgments in both cases were entered on January 23, 1967. (R. 58, p. 224, 230; R. 66, p. 284, 290)[1] Timely petitions for rehearing were denied on April 10, 1967. (R. 58, p. 226; R. 66, p. 286.) By order dated June 28, 1967, Mr. Justice White extended the time for filing this petition to and including August 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a State court can reject work done by the Bureau of Reclamation as insufficient to establish a priority date for water rights for federal projects when this work would have been sufficient if done by someone other than the United States?

2. Whether the federal plan for the comprehensive development of the Upper Basin of the Colorado River, when coupled with field surveys and soil borings by the Bureau of Reclamation as one of the essential steps toward authorization of particular federal reclamation projects contemplated by an Act of Congress, establish a federal intent to appropriate water and to apply it to beneficial use?[2]

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[1] "R" refers to the record as certified to this Court by the Clerk of the Colorado Supreme Court. For convenience, the two cases are distinguished by the last two digits of the docket number before that court. Thus, R.58 refers to the record in Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, No. 21358, and R.66 refers to the record in Four Counties Water Users Ass'n. v. Middle Park Water Conservancy District, No. 21566. "App." refers to the appendices to this petition.

[2] If this petition is granted, petitioners reserve the right to argue the additional related questions of whether the decisions violate Article IX(a) of the Upper Colorado River Basin Compact of 1948 and whether the State of Colorado has bound itself to grant water rights sufficient for reclamation projects constructed under the Colorado River Storage Project Act.

STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. § 391; Section 2 of the Boulder Canyon Project Adjustment Act of 1940, 54 Stat. 744, as amended, 43 U.S.C. § 618a; Sections 1, 2, and 3 of the Colorado River Storage Project Act of 1956, 70 Stat. 105, as amended, 43 U.S.C. § 620, 620a, and 620b, respectively. These are reprinted in pertinent part in Appendix C hereto.

STATEMENT

How the Federal Questions Were Raised. The judgments to which this petition relates resulted from two proceedings initiated by the petitioners in the District Courts of Colorado to establish water rights for four water storage projects to be constructed by the federal government as participating projects within the meaning of the Colorado River Storage Project Act. One proceeding involved the Wessels and Toponas projects; the other involved the Rabbit Ear and Troublesome projects. The proofs offered for each project established that the priority dates claimed were based on work performed by the Bureau of Reclamation. In each case, the District Court entered a conditional decree awarding rights with these priority dates. The Colorado Supreme Court vacated the priority dates in the conditional decrees and ordered the District Court to award priorities based on later work done by petitioners, even though this work was less extensive than that of the Bureau. The reason given for this action was that the work by the Bureau of Reclamation was insufficient to establish an intent to appropriate water. (App. A, p. A-6; App. B, pp. B-5-6.) This ground received only passing mention in the briefs of the plaintiffs in error (respondents herein) and consequently was not fully briefed by petitioners. (See R. 58, p. 212 (Br. pp. 9-10); R. 66, p. 271 (Br. p. 9).) After the Court rendered its opinions setting forth the reasons therefor, petitioners in petitions for rehearing set out in full the federal plan for the develop-

ment of the Upper Basin and raised the questions of whether the Court properly determined the federal intent and had discriminated against the United States by rejecting work which would have been sufficient to establish intention and a priority date had it been done by a private party rather than by the United States. (R. 58, p. 225; R. 66, p. 285.)

Background of the Litigation. Pursuant to Section 2 Reclamation Act of 1902, 43 U.S.C. § 411, and Section 2 Boulder Canyon Adjustment Act of 1940, 43 U.S.C., § 618a, the Bureau of Reclamation has conducted studies of potential reclamation projects in the Colorado River Basin. An established procedure is followed from initial study of such projects to final authorization of construction by Congress, and this procedure was being followed by the Bureau in connection with the projects involved in this petition.

Over a 20 year period preceding 1946, the Bureau of Reclamation investigated the potential irrigation and power sites in the Colorado River Basin. The results of these investigations were compiled into an inventory of projects and plan for comprehensive development, published in 1944 as U.S. Department of Interior, *The Colorado River: A Natural Menace Becomes a National Resource,* [hereinafter referred to as *The Colorado River (1944)*].[3] This report was subsequently further refined and republished in 1946 as U.S. Department of Interior, *The Colorado River: A Comprehensive Report on the Development of the Water Resources of the Colorado River Basin* [hereinafter referred to as *The Colorado River Basin Report (1946)*].[4] The next step toward

[3]In this report the Wessels and the Troublesome projects were referred to by their present names. Rabbit Ear was called the Muddy Creek Project and that portion of the Toponas on the Yampa River was therein called the Upper Yampa Project. For material relating to these projects see pp. 65, 74, 87, 92, 100 and 102.

[4]The project nomenclature in this report is the same as that in the previous report, *The Colorado River (1944). The Colorado River Basin Report* (1946), was again published with Federal and State Comments as H.R. Doc. No. 419, 80th Cong., 1st Sess. (1947).

federal construction of the projects included in these reports is an initial investigation called a reconnaissance survey which determines whether further planning on a particular project is feasible. Those found feasible are referred to local and State agencies which recommend a priority schedule for the more detailed feasibility investigations necessary to support a request for Congressional authorization and appropriation of construction funds. This establishment of priorities is necessary because feasibility investigation for an average project costs $200,000 - $300,000 and takes 2-3 years to complete (R. 58, pp. 162-63; R. 66, p. 190), and the Bureau, because of fund limitations, can begin only a few each year. As the projects on the priority list are reached, the necessary funds are included in the budget request submitted to Congress by the Bureau of Reclamation. (R. 66, p. 193.) On the basis of these detailed investigations, the Secretary of the Interior recommends to Congress that individual projects be authorized. (R. 66, pp. 159, 167.)

Quite obviously, a matter of primary concern in connection with any water resource development is a water right sufficient for the project. By virtue of Section 8 of the Reclamation Act, these water rights have heretofore been obtained under State law.[5] Because of the magnitude and cost of the work involved in the feasibility investigations, it is necessary to obtain these rights before that study is commenced. (R. 58, pp. 163-64; R. 66, pp. 169-70, 175.)

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[5] 43 U.S.C. § 383. Colorado, in common with other Western States, follows the doctrine of prior appropriation under which the first in time to use the water has the first right to it. *E.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). By statute water rights are evidenced by a court decree granting either an absolute right, i.e., presently used, or a conditional right, i.e., to be used in the future. In either case, the right relates back to the date the first work evidencing an intent to appropriate water was commenced. See, *e.g.*, Taussig v. Moffatt Tunnel Water and Development Co., 106 Colo. 384, 106 P.2d 363, 366 (1940).

This is normally done between the time of the initial work and the time the project is reached on the priority list.

Although the United States could obtain these water rights in its own name, it is customary for local organizations (such as the petitioners) to obtain them upon request of the Secretary of the Interior and thereafter to assign them to the United States for use in the development and operation of particular projects.[6] These organizations have in the past obtained conditional decrees with priorities relating back to the reconnaissance surveys conducted by the Bureau of Reclamation. (R. 58, p. 148.)

The Projects Involved. Two of the projects involved in this petition, Rabbit Ear and Troublesome, were specifically designated for priority of planning by Congress in Section 2 of the Colorado River Storage Project Act of 1956, 70 Stat. 106, as amended, 43 U.S.C. § 620a. Toponas and Wessels, the remaining two, fall within the contemplation of Section 3 of that Act, 70 Stat. 107 as amended, 43 U.S.C. § 620b.

The priority dates for the water rights for these projects awarded by the trial court related back to reconnaissance surveys by the Bureau of Reclamation reported in two important sub-basin studies: U.S. Department of Interior, *Cliffs-Divide Project, Colorado, Status Report* (1954) (Rabbit Ear, Troublesome and part of Toponas); and *Yampa-White Project, Colorado, Utah and Wyoming, Reconnaissance Report* (1957), (Wessels and part of Toponas), referred to hereinafter as *Cliffs-Divide Report* and *Yampa-White Report.* The work performed in connection with these surveys, further refined and developed earlier Basin development plans of 1944 and 1946, both of which specifically mentioned each of the four projects.[7] As a result

[6] Board action by petitioner Colorado River Water Conservation District and one such assignment are set forth as Appendix D hereto.

[7] A map of Colorado projects published in both reports which shows all four projects is reproduced herein as Appendix E. As stated *supra,* note 3, Rabbit Ear was called the Muddy Creek Project and that part of Toponas on the Yampa River was called the Upper Yampa Project.

of this work each project was found feasible and detailed investigation precedent to authorization by Congress was recommended.

1. *Rabbit Ear Project.*[8] The reconnaissance surveys for the project, ultimately reported in the *Cliffs-Divide Report,* pp. 43-45, consisted of land classification studies and field surveys. These studies involved preparation of base maps from aerial photographs followed by field surveys and approximately six soil borings per square mile. (R. 66, p. 182-85). The field work was conducted between September 3-16, 1950. (R. 66, p. 186.) When the land classification studies were completed, a survey of the canal systems was commenced on July 9, 1952. (R. 66, p. 176.)

The project was found feasible within reclamation criteria (R. 66, p. 167), and given a priority for feasibility investigation. (R. 66, pp. 189-90.)

The State of Colorado participated in this study by contributing funds (R. 66, p. 161.) However, the major share of the cost was borne by the United States, which has expended $22,128 on this project to date. (R. 66, p. 191.)

2. *Troublesome Project.* Field work on this project was similar to that on Rabbit Ear. Surveys and soil borings began in August, 1950. (R. 66, pp. 209-210). Survey of the canal system began on October 3, 1951. (R. 66, p. 211.) The results of these studies are contained in the *Cliffs-Divide Report,* pp. 39-42.

Troublesome was found feasible within reclamation criteria and was also assigned a priority. (R. 66, p. 212.)

The United States has expended to date $19,407 on the project. (R. 66, p. 216.)

3. *Toponas Project.* Planning for the project has been under way since the 1930's when some work was done by the WPA. (R. 58, pp. 196-97.) After World War II

[8]The name of this project is referred to correctly in the statement of claim, R. 66, p. 1, but the reporter's transcript, the trial court, and the Supreme Court incorrectly refer to it as Rabbit Ears.

work was resumed, and by August, 1951, land classification surveys and soil borings were complete. (R. 58, pp. 181-82) Survey work on the Toponas reservoir was conducted in August, 1952. (R. 58, pp. 185-86) Bureau of Reclamation findings in connection with Toponas were included in both the *Cliffs-Divide Report*, pp. 55-58, and in the *Yampa-White Report*, p. 82, since a part of the project lies in the Yampa River Basin.

Toponas was found feasible and assigned a priority. (R. 58, pp. 202-03.)

The United States has expended a total of $25,768 to date on the Toponas project. (R. 58, p. 190.)

4. *Wessels Project.* Work began in July, 1954, and consisted of land classification surveys, field surveys and soil borings, (R. 58, p. 150.) The results of this work were set out in the *Yampa-White Report*, pp. 23-28.

Wessels was found feasible and assigned a priority number. (R. 58, p. 162.)

Importance of the Water Rights Priority Dates.

In both proceedings respondent Four Counties Water Users Association filed claims proposing to divert water in large part from the same sources as the proposed reclamation projects. In earlier, though companion, decisions the Supreme Court of Colorado ordered the award of conditional decrees to Four Counties with a priority based on the commencement of field survey.[9] The Bureau of Reclamation work antedates the priority of Four Counties, and a water right based on that work would give a superior right for the reclamation projects. Due in large measure to water shortages, downstream usage, compact and treaty commitments,[10] the sup-

[9]Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, 414 P.2d 469 (1966); Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, 414 P.2d 478 (1966).

[10]*E.g.*, Boulder Canyon Project Act of 1928, 45 Stat. 1057, as amended, 43 U.S.C. §§ 617 - 617t; Colorado River Compact of 1922,

ply of water is limited; and there is insufficient water available for the reclamation projects and Four Counties' proposed diversions.

REASONS FOR GRANTING THE WRIT

I

The Decisions Threaten the Federal Reclamation Program in Colorado

The court below has held that the United States cannot have the requisite intent to appropriate water for federal projects, planned for over ten years, at very least until Congress appropriates money for a detailed feasibility investigation (the final step prior to authorization of construction), and probably not until construction is authorized. This rule will jeopardize the water rights for reclamation projects throughout Colorado either awaiting feasibility investigation, under feasibility investigation, authorized, or actually constructed under the Colorado River Storage Project Act. The Bureau of Reclamation has stated that these decisions may threaten water rights to twenty six additional federal projects, representing a total estimated federal expenditure of $920,583,288 and on which $123,661,029 has already been spent. See letter of Assistant Commission of Reclamation Stamm attached hereto as Appendix F. Nine of these projects have already been authorized,[11] and the United States may now have to condemn water rights before they can commence operation. Five others are now

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H.R. Doc. 605, 67th Cong., 4th Sess. (1923), consented to for negotiation by the Act of August 19, 1921, 42 Stat. 171, and consented to in Section 13(a) of the Boulder Canyon Project Act, 45 Stat. 1064, as amended, 43 U.S.C. § 617*l*; Upper Colorado River Basin Compact of 1948, approved by Congress April 6, 1949, 63 Stat. 31; Treaty of February 3, 1944, with Mexico respecting utilization of waters of the Colorado and Tijuana Rivers and the Rio Grande, 59 Stat. 1219 (1945), T.S. 994.

[11] These projects are Collbran, Florida Paonia, Smith Fork, Curecanti, Silt, Bostwick Park, Fruitland Mesa and Savory-Pot Hook.

before Congress for authorization[12] of construction based on feasibility reports which presuppose water rights that might be challenged under these decisions. Those not yet authorized may prove infeasible and have to be abandoned if the United States must acquire the water rights by eminent domain, thus depriving the Colorado as well as other water users on the Colorado River of essential water storage projects. If the projects are authorized, condemnation of rights will add many hundreds of thousands of dollars to the cost, and thereby put the cost beyond the ability of the users to repay.

This threat arises because many of these projects have water rights based on reconnaisance surveys of the type the Colorado Supreme Court held insufficient in these cases. One example of an important project in immediate danger is the Juniper on the Yampa River. It has a decree based on surveys made in connection with the *Yampa-White Report*, and this decree is presently under attack by Four Counties.[13]

These decisions go to the very heart of the reclamation program in Colorado – the water rights necessary for federal projects. If they are allowed to stand, the plan established by Congress for the comprehensive development of the Upper Basin may be at least seriously delayed and at most permanently curtailed. They are, therefore, important cases which merit review by this Court.

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[12]These projects are Animas-La Plata, Dolores, West Divide, Dallas Creek, and San Miguel. The Central Arizona Project Bill (S. 1004) which passed the Senate on August 7, 1967, authorizes these projects.

[13]The Juniper Project was singled out by Congress for expeditious investigation, 43 U.S.C. § 620a. The decree granting its rights is being challenged on the same grounds urged on the State Supreme Court in the cases involved in this petition, and certainly that Court has squarely held the *Yampa-White Report* and the surveys leading thereto are insufficient evidence of an intention to appropriate and use water.

II

The Decisions Establish a Dual Standard for the Acquisition of Water Rights Which Discriminates Against the United States and Will Frustrate the Reclamation Program in Colorado

Under Colorado law a right to appropriate water may relate back to the time the first open step was taken giving notice of intent to secure it (App. A, p. A-5). The requirement of the rule and the reason for it were concisely stated in *Fruitland Irrigation Co. v. Kruemling*, 62 Colo. 160, 162 Pac. 161, 163 (1917):

> Certainly the first step demanded by the rule is nothing short of an open and notorious physical demonstration, conclusively indicating a fixed purpose to diligently pursue, and within a reasonable time, ultimately acquire a right to the use of water, and as its primary function is to give notice to those subsequently desiring to initiate similar rights, it must necessarily be of such a character that they may fairly be said to be thereby charged with at least such notice as would reasonably be calculated to put them on inquiry of the prospective extent of the proposed use and the consequent demand upon the water supply involved.[14]

The Supreme Court of Colorado has held that the initiation of surveys constitutes a first step sufficient to acquire a priority for the right as of the date that work commenced.[15] In fact, in companion cases to the ones involved in this petition the Colorado Court concluded that the field

[14] In this case the court rejected a claim that $5.00 worth of work was sufficient evidence of the requisite intent. Language from this opinion quoted by the court (App. A, pp. A-6, A-7) must be read in the light of this fact.

[15] Taussig v. Moffat Tunnel Water and Development Co., 106 Colo. 384, 106 P.2d 363, 367 (1940); Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961).

surveys of Four Counties Water Users Association evidenced such an intention, even though the surveys were less detailed and less extensive than those conducted by the Bureau of Reclamation in these cases. *Four Counties Water Users Ass'n. v. Colorado River Water Conservation District*, 414 P.2d 469, 475 (1966); *Four Counties Water Users Ass'n. v. Colorado River Water Conservation District*, 414 P.2d 478 (1966).

The discrimination against the United States is further evidenced by the priority dates finally awarded petitioners by the Supreme Court of Colorado for these projects. Although the Court would not accept the work of the Bureau as sufficient to establish an intent to appropriate water, it awarded dates based on surveys conducted by the petitioners which were less detailed and less extensive than those conducted by the Bureau. Yet, since the federal government is to build the projects, petitioners could not have had any greater intent to appropriate water than the Bureau of Reclamation had when it made the reconnaissance surveys. It should be noted that the petitioners' evidence before the trial court concerning lands to be irrigated by these projects and water requirements therefor were taken entirely from the previous Bureau of Reclamation investigations. The only work done by the Districts were the surveys for and preparation of the map and statement filed with the State Engineer.

The work on the individual projects subsequently published in the *Cliffs-Divide Report*, and the *Yampa-White Report* gave ample notice of a fixed purpose to appropriate water for the four projects. It is crystal clear under the decisions of the Court below that this work would be sufficient had it been done by anyone other than the United States.

The result of these decisions is that non-federal interests can obtain water rights under Colorado law by performing survey work on a proposed project and thereafter diligently pursuing the proposal to completion. The United States, however, cannot acquire a water right under these decisions

until Congress appropriates funds for a detailed investigation of the project and probably not until construction is actually authorized, even though the reconnaissance surveys constitute an essential step in an established procedure by which reclamation projects are authorized.

This dual standard puts the United States in a disadvantageous position in the competition for water in short supply areas such as Colorado. Notwithstanding the fact that work performed by the United States has given notice of its intent to construct a water resource project, private parties (who may or may not be speculating on the water rights) are allowed to pre-empt the water rights necessary for it. Since federal water rights must be obtained under State law, the impact on the reclamation program is immediate, adverse, and substantial.

The Colorado Supreme Court misconstrued the purpose of the work upon which the date for the water rights were claimed and the place of this work in the federal procedure leading to the construction of these projects. Consequently, the decisions placed an intolerable burden upon the United States and those claiming under it as beneficiaries of the reclamation program.

III

The Intent To Appropriate Water Is Manifest From the Background and Scope of Planning for the Federal Development of the Upper Basin of the Colorado River

The Supreme Court of Colorado decisions ignore the vast federal activity which led to the comprehensive plan for developing the water resources of the Upper Basin embodied in the Colorado River Storage Act and the 1944 and 1946 reports leading thereto. Because of this activity the intent of the United States cannot be ascertained by the examination of isolated acts; the entire range of federal activity must be considered. When the surveys and soil classification work which support the rights claimed by petitioners are placed in

the context of this activity the error of the court below becomes readily apparent. Since the intent of the United States is what the court below undertook to determine, its decisions present a federal question cognizable by this Court.

The projects involved here had been under consideration long before the work upon which the water rights were based was performed. Planning work was commenced on these projects in the 1930's.[16] Thus the projects had been inventoried and included in development plans prior to the time the work reported in the *Cliffs-Divide Report* and *Yampa-White Report* was performed. Significantly, the *Cliffs-Divide Report* was before Congress in enacting the Colorado River Storage Project Act of 1956.[17]

The Colorado River Storage Project Act sets forth a Congressional plan for the comprehensive development of the Upper Basin which duplicates the vast development plan embodied in the Boulder Canyon Project Act of 1928.[18] Rabbit

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[16] *The Colorado River (1944)*, pp. 65, 74, 87, 92, 100, 102. See also testimony of former Commissioner Dexheimer, Hearings on S. 500 before the Subcommittee on Irrigation and Reclamation of Senate Committee on Interior & Insular Affairs, 84th Cong., 1st Sess., 16 (1955), (which bill became the Colorado River Storage Project Act of 1956):

> After some 20 years of investigations, the Bureau of Reclamation issued the Colorado River Basin Report in 1946 covering potential development of the Colorado River including over 100 irrigation and power projects in the upper basin. This report was an inventory and served as a guide for planning and compact negotiation.

[17] For data taken from this report relating specifically to Rabbit Ear and Troublesome see Hearings Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, Colorado River Storage Project, 84th Cong., 1st Sess., 155-59 (1955).

[18] A stated purpose of the statute was "to initiate the comprehensive development of the water resources of the Upper Colorado River Basin. . . ." 43 U.S.C. § 620. See also S. Rep. No. 128, 84th Cong., 1st Sess. 2 (1955); H. Rep. No. 1087, 84th Cong., 1st Sess., 3-4, 6-7

Ear and Troublesome are specifically designated for priority of planning by that Act. Toponas and Wessels are clearly within the contemplation of Section 3 of the Act.

It is clear, therefore, that the United States had formulated a plan for development of these projects before the work in question was performed. That work was not merely for information purposes, as the Court below assumed, but the last step before feasibility investigation and eventual authorization of these particular projects. In fact, it was necessarily the last federal step leading to the acquisition of water rights for the projects, since under existing procedure these rights should be firm before the expensive feasibility investigations are commenced.

The Colorado Court's insistence that the United States can intend to construct a project only if Congress has either authorized a particular project or appropriated funds for a feasibility investigation, misconceives the relationship between the Congress and the Department of the Interior in carrying out the reclamation program. Congress has delegated the responsibility for planning federal projects to the Secretary of the Interior. Congress funds the investigations of potential reclamation projects and authorizes their construction once the planning is completed by the Secretary. In ascertaining the intent of the United States, the totality of federal activity – executive and legislative – must be considered. By failing to do so, the Colorado Court has held the United States to a different and more exacting standard than private individuals who are not required to

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(1955). The vastness of the project and its cost to the United States is exemplified in U. S. Dept. of Interior *Colorado River Storage Project and Participating Projects, 10th Annual Report,* (1966). This report to Congress reflects total expenditures through the fiscal year ending June 30, 1966 on the Colorado River Storage Project Act features of $706,152,416. Of the four big storage features, Glen Canyon, Flaming Gorge, Navajo and Curecanti, the first three were substantially completed, and the fourth was well along in construction.

give notice that a project *will* be built but only that one is intended if financing, engineering, and construction plans are feasible and can be successfully completed.[19]

The Colorado Supreme Court ignored the federal activity which had preceded the work upon which the rights were based, as well as the Congressional plan for the comprehensive development of the Upper Basin, and in so doing it erroneously decided a federal question of substantial importance.[20] This Court should correct that error.

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[19]The necessity for conditional decrees prior to the time work of this magnitude is undertaken was discussed by the Supreme Court of Colorado in Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Conservation Dist., 148 Colo. 173, 194, 365 P.2d 273, 284-85 (1961):

> Passage of time and events occurring prior to granting any final decree will produce definite answers to the questions upon which the trial judge made findings based on speculative and unsupporting evidence, and used as the basis for denying any decrees. Only time can definitely determine whether all, a part, or none of the claimed water is needed. Time and work will demonstrate whether the engineering and construction plans are feasible and can be successfully completed. Time will tell whether finances can be made available. If these prerequisites to a final decree are not brought to pass within a reasonable time, the conditional decrees must be canceled or modified as only partially established.
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> * * *
>
> It is inconceivable that any development of the magnitude of that proposed by the Association involving the expenditure of more than $33,000,000 over a period of five or more years can be completed without the aid of the conditional decree statutes. Assurance of a decree on completion of a project is a prerequisite to complete financing, engineering and construction. The conditional decree statute is designed to meet the very problems confronting the Association, and it should be construed and applied so as to aid and encourage, rather than to block development and early use of the water resources of the state.

[20]The court also ignored Article IX(a) of the Upper Colorado River Basin compact of 1948, approved by Congress, 63 Stat. 31 (1949), which recognized the right of the United States to acquire rights to the use of water in the signatory states without limitation. These decisions place a severe and unreasonable restriction upon the United States in the acquisition of water rights in Colorado.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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